

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
JOSEPH J. CARROLL,

Plaintiff,

07-cv-11577

-against-

CITY OF MOUNT VERNON,

AFFIDAVIT OF HOWARD M. MILLER

ERNEST D. DAVIS, Individually and as Mayor
of the City of Mount Vernon

CITY OF MOUNT VERNON DEPARTMENT
OF FIRE,

and

NICHOLAS CICHETTI, Individually and as
Commissioner of Fire for the City of Mount Vernon

Defendants.

[illegible]

HOWARD M. MILLER, being duly sworn deposes and says:

1. I am a member of Bond, Schoeneck & King, PLLC, counsel for Defendants, and submit this reply affidavit in support of Defendants' motion to dismiss the first amended complaint.

2. Annexed hereto as “Exhibit A” is a copy of the Report of Personnel Change and accompanying EEO/Affirmative Action Data regarding the promotion of Michael Brown to Fire Lieutenant on March 16, 2007.

3. Annexed hereto as “Exhibit B” is a copy of the Report of Personnel Change and accompanying EEO/Affirmative Action Data regarding the promotion of Joseph Dalo to Fire Lieutenant on December 14, 2007.


4. Annexed hereto as "Exhibit C" is a copy of the Report of Personnel Change and accompanying EEO/Affirmative Action Data regarding the promotion of Justin Chase to Fire Lieutenant on December 14, 2007.

5. The documents annexed as "Exhibit A," "Exhibit B," and "Exhibit C" are properly before this Court because they are public Civil Service records and the Court may take judicial notice of public records without converting a motion to dismiss into one for summary judgment. *See Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773 (2d Cir. 1991); *Kempkes v. Downey*, 2008 WL 852765, *3 (S.D.N.Y. 2008); *Evans v. New York Botanical Garden*, 2002 WL 31002814 (S.D.N.Y. 2002).



Howard M. Miller

Sworn to before me this
15th day of August 2008.


Notary Public

Jessica C. Satriano
Notary Public, State of New York
No. 02SA6176548
Qualified in Nassau County
Commission Expires October 29, 2011

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2008 the foregoing document was filed with the Clerk of the Court and served in accordance with the Federal Rules of Civil Procedure, and/or the Southern District's Local Rules, and/or the Southern District's Rules on Electronic Service upon the following parties and participants:

Andrew P. Fleming, Esq.
CHIAACCHIA & FLEMING, LLP
5113 South Park Avenue
Hamburg, New York 14075

A handwritten signature in black ink, appearing to read 'H/M', is positioned above a horizontal line.

Howard M. Miller (HM4538)
Attorneys for Defendants
1399 Franklin Avenue, Suite 200
Garden City, New York 11530
(516) 267-6300
hmler@bsk.com

Exhibit A

Report all personnel changes on this form. Send one copy prior to payroll affected by this change.

REPORT OF PERSONNEL CHANGE

DATE 03 / 16 / 2007
Month Day Year

TO: Municipal Civil Service Commission
MOUNT VERNON, NEW YORK

FROM: FIRE
DEPARTMENT

LT. BART KRAISKY
NAME AND TITLE OF LAST EMPLOYEE IN POSITION

MICHAEL J. BROWN
NAME OF EMPLOYEE

233 RICH AVE, MOUNT VERNON, NY 10555
ADDRESS

LIEUTENANT
TITLE OF POSITION

\$ 79,165.00
SALARY

114-64-9639
Social Security Number

MALE ☒ FEMALE ☐
Veteran ☐ Non-Veteran ☐
Disabled Veteran ☐ Exempt Volunteer Fireman ☐

Check nature of Personnel Change		DATE EFFECTIVE
APPOINTMENTS	<input checked="" type="checkbox"/> Permanent	<u>03/16/2007</u>
	<input type="checkbox"/> Provisional	
	<input type="checkbox"/> Temporary	From To
	<input type="checkbox"/> Temporary Emergency	From To
TERMINATIONS	<input type="checkbox"/> Resignation - Letter Attached	
	<input type="checkbox"/> Retirement	
	<input type="checkbox"/> Deceased	
	<input type="checkbox"/> Removal	
	<input checked="" type="checkbox"/> Terminated <u>AS Firefighter</u>	<u>3/16/07</u>
OTHER CHANGES	<input type="checkbox"/> Leave of absence	From To
	<input type="checkbox"/> Transfer	
	<input type="checkbox"/> Demotion	
	<input type="checkbox"/> Suspension	
	<input type="checkbox"/> Reinstatement	
	<input type="checkbox"/> Absent Without Pay	
	<input checked="" type="checkbox"/> Change in salary	<u>3-16-2007</u>
	<input type="checkbox"/> Change in name	
<input type="checkbox"/> Other		

REMARKS: (Any further information should be continued under remarks.)

GRADE: STEP:
cc: Comptroller's Office
Mayor's Office
City Clerk
Affirmative Action
File copy

Promotion to Fire Lieutenant

as per
Page 87

APPOINTING OFFICER [Signature]
TITLE FIRE COMR. NICHOLAS CICCHETTI

EEO/AFFIRMATIVE ACTION DATA

PLEASE CHECK APPLICABLE CATEGORIES:

☒ MALE ☐ FEMALE
☐ Black ☒ White ☐ Hispanic ☐ Asian ☐ Amer. Indian

EEO-4 CATEGORY

- ☐ 1. Officials/Administrators
- ☐ 2. Professionals
- ☐ 3. Technicians
- ☒ 4. Protective Services
- ☐ 5. Para-Professionals
- ☐ 6. Office/Clerical
- ☐ 7. Skilled Craft
- ☐ 8. Service/Maintenance

CIVIL SERVICE STATUS

- ☐ 1. Exempt - positions for which competitive or noncompetitive examinations are not practicable.
- ☒ 2. Competitive - All positions for which it is practicable to determine the merit and fitness of the applicant by examination.
- ☐ 3. Non-competitive - All positions that are not in the exempt class or the labor class and for which it is found by the Civil Service Commission of Mount Vernon not to be practicable to ascertain the merit and fitness of applicants by examination.
- ☐ 4. Laborer - Unskilled workers.
- ☐ 5. Unclassified

Exhibit B

REPORT OF PERSONNEL CHANGE		DATE 12 / 14 / 2007 Month Day Year
<p>Report all personnel changes on this form. Send one copy prior to payroll affected by this change.</p> <p>To: Municipal Civil Service Commission MOUNT VERNON, NEW YORK</p> <p>FROM: <u>Fire Department</u> DEPARTMENT</p> <p><u>LT. Joseph Pascarelli</u> NAME AND TITLE OF LAST EMPLOYEE IN POSITION</p>		<p><u>Joseph Dalo</u> NAME OF EMPLOYEE</p> <p><u>303 Kensington Ct. Brewster, NY 10560</u> ADDRESS</p> <p><u>Fire Lieutenant</u> TITLE OF POSITION</p> <p>MALE <input checked="" type="checkbox"/> FEMALE <input type="checkbox"/> Veteran <input type="checkbox"/> Non-Veteran <input type="checkbox"/> Disabled Veteran <input type="checkbox"/> Exempt Volunteer Fireman <input type="checkbox"/></p> <p><u>\$ 79,165.00</u> SALARY</p> <p><u>089-60-9717</u> Social Security Number</p>
Check nature of Personnel Change		
APPOINTMENTS	<input checked="" type="checkbox"/> Permanent	DATE EFFECTIVE
	<input type="checkbox"/> Provisional	
	<input type="checkbox"/> Temporary	
	<input type="checkbox"/> Temporary Emergency	
TERMINATIONS	<input type="checkbox"/> Resignation - Letter Attached	From To
	<input type="checkbox"/> Retirement	
	<input type="checkbox"/> Deceased	
	<input type="checkbox"/> Removal	
	<input type="checkbox"/> Terminated	
OTHER CHANGES	<input type="checkbox"/> Leave of absence	From To
	<input type="checkbox"/> Transfer	
	<input type="checkbox"/> Demotion	
	<input type="checkbox"/> Suspension	
	<input type="checkbox"/> Reinstatement	
	<input type="checkbox"/> Absent Without Pay	
	<input checked="" type="checkbox"/> Change in salary	
	<input type="checkbox"/> Change in name	
<input type="checkbox"/> Other		
<p>REMARKS: (Any further information should be continued under remarks.)</p> <p>GRADE: STEP:</p> <p>cc: Comptroller's Office Mayor's Office City Clerk Affirmative Action File copy</p> <p style="text-align: center; font-size: 1.2em;">Promotion to Fire Lieutenant</p>		
<p>pg 122 El Rk</p>		<p>APPOINTING OFFICER: <u>[Signature]</u></p> <p>TITLE: <u>Deputy Fire Commissioner</u></p>

EEO/AFFIRMATIVE ACTION DATA

PLEASE CHECK APPLICABLE CATEGORIES:

☒ MALE☐ FEMALE☐ Black☒ White☐ Hispanic☐ Asian☐ Amer. IndianEEO-4 CATEGORY☐ 1. Officials/Administrators☐ 2. Professionals☐ 3. Technicians☒ 4. Protective Services☐ 5. Para-Professionals☐ 6. Office/Clerical☐ 7. Skilled Craft☐ 8. Service/MaintenanceCIVIL SERVICE STATUS☐ 1. Exempt - positions for which competitive or noncompetitive examinations are not practicable.☒ 2. Competitive - All positions for which it is practicable to determine the merit and fitness of the applicant by examination.☐ 3. Non-competitive - All positions that are not in the exempt class or the labor class and for which it is found by the Civil Service Commission of Mount Vernon not to be practicable to ascertain the merit and fitness of applicants by examination.☐ 4. Laborer - Unskilled workers.☐ 5. Unclassified

Exhibit C

REPORT OF PERSONNEL CHANGE		DATE 12 Month 14 Day 2007 Year	
Report all personnel changes on this form. Send one copy prior to payroll affected by this change.			
To: Municipal Civil Service Commission MOUNT VERNON, NEW YORK		Justin B. Chase NAME OF EMPLOYEE	
FROM: Fire Department DEPARTMENT		5 Whitehall Rd #2 Eastchester, NY 10701 ADDRESS	
LT. John Newman NAME AND TITLE OF LAST EMPLOYEE IN POSITION		Fire Lieutenant \$ 79,165.00 TITLE OF POSITION SALARY	
		MALE <input checked="" type="checkbox"/> FEMALE <input type="checkbox"/> Veteran <input type="checkbox"/> Non-Veteran <input type="checkbox"/> Disabled Veteran <input type="checkbox"/> Exempt Volunteer Fireman <input type="checkbox"/>	
		059-62-2421 Social Security Number	
APPOINTMENTS	Check nature of Personnel Change	DATE EFFECTIVE	
	<input checked="" type="checkbox"/> Permanent Promoted off 12-14-07		
	<input type="checkbox"/> Provisional		
	<input type="checkbox"/> Temporary		
TERMINATIONS	<input type="checkbox"/> Temporary Emergency	From To	
	<input type="checkbox"/> Resignation - Letter Attached	From To	
	<input type="checkbox"/> Retirement		
	<input type="checkbox"/> Deceased		
OTHER CHANGES	<input type="checkbox"/> Removal		
	<input checked="" type="checkbox"/> Terminated aa 77 12-13-07		
	<input type="checkbox"/> Leave of absence	From To	
	<input type="checkbox"/> Transfer		
	<input type="checkbox"/> Demotion		
	<input type="checkbox"/> Suspension		
	<input type="checkbox"/> Reinstatement		
	<input type="checkbox"/> Absent Without Pay		
<input checked="" type="checkbox"/> Change in salary		December 14, 2007	
<input type="checkbox"/> Change in name			
<input type="checkbox"/> Other			
REMARKS: (Any further information should be continued under remarks.)			
GRADE: STEP:			
cc: Comptroller's Office			
Mayor's Office			
City Clerk			
Affirmative Action			
File copy			
Promotion to Fire Lieutenant			
pg 122 El bk			
APPOINTING OFFICER [Signature]			
TITLE Deputy Fire Commissioner			

EEO/AFFIRMATIVE ACTION DATA

PLEASE CHECK APPLICABLE CATEGORIES:

☒ MALE

☐ FEMALE

☐ Black

☒ White

☐ Hispanic

☐ Asian

☐ Amer. Indian

EEO-4 CATEGORY

☐ 1. Officials/Administrators

☐ 2. Professionals

☐ 3. Technicians

☒ 4. Protective Services

☐ 5. Para-Professionals

☐ 6. Office/Clerical

☐ 7. Skilled Craft

☐ 8. Service/Maintenance

CIVIL SERVICE STATUS

☐ 1. Exempt - positions for which competitive or noncompetitive examinations are not practicable.

☒ 2. Competitive - All positions for which it is practicable to determine the merit and fitness of the applicant by examination.

☐ 3. Non-competitive - All positions that are not in the exempt class or the labor class and for which it is found by the Civil Service Commission of Mount Vernon not to be practicable to ascertain the merit and fitness of applicants by examination.

☐ 4. Laborer - Unskilled workers.

☐ 5. Unclassified